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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY EUGENE YARBROUGH et al., Defendants and Appellants.	H029587 (Santa Clara County Super. Ct. No. EE303089)

Defendants Anthony Eugene Yarbrough and Eric Matthew Riley were convicted at a jury trial of multiple counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b), hereafter 460(b)),[1] attempted burglary (§§ 664, 459, 460(b)), and conspiracy to commit burglary (§§ 182, subd. (a)(1), hereafter 182(a)(1), 459, 460(b)) and were each sentenced to four years in state prison. On appeal, they challenge the addition of a new offense in an amended complaint, the sufficiency of the evidence, the admission of evidence of uncharged burglaries, and an attorney fee order.

FACTS

Defendants came to the attention of the Sunnyvale Police on February 25, 2003, sometime after the early-morning "smash-and-grab" burglary of Cellgate Company from which two computers were taken (count 5). Michael Hamburger, security officer at

[1] Further statutory references are to the Penal Code unless otherwise stated.

Electronic Data Systems, next door to Cellgate Company, reported the license number of a car he had contacted in the parking lot of his building. On his surveillance monitors, he saw the car pull into the parking lot and two Black males get out and move through some bushes. Hamburger went out and contacted them. They were in their 20s and both were wearing jackets with hoods over their heads. They said they were on their way to a McDonald's restaurant which was 70 to 80 yards away. Hamburger told them to leave, and later wrote down the license plate number of their car from memory. He recorded it as 4KJT596. When he attempted to review the videotape, he accidentally erased it. Hamburger later picked three photos, including a photo of Riley, from an 18-person photo lineup. He stated he was 75 percent sure that one of the photos was the person he saw that night. At trial, Hamburger testified that he was totally sure of his identification of Riley.

The Cellgate burglary took place after 3:00 a.m. on February 25, which was the time Cellgate employee Paul McGrane left work. McGrane's laptop had been on his desk, about three feet from his window, which was smashed. A second computer, also left on a desk near a window which was smashed, was also taken. The value of the computers and the cost to repair the windows was $4,631.50.

A little more than three months later, in the early morning of May 28, 2003, defendants' license plate number again was recorded. Two employees of Tuvox in Cupertino (count 4) were working late. One of them, Craig So, heard glass breaking and called 911. He hid in his office until the police arrived. When he came out, he saw that the window of a coworker's office had been broken and her laptop computer was gone. Defendant Riley's license plate number was recorded by Los Altos Police Captain Thomas Connelly, who was on patrol near Tuvox when the 911 call was broadcast. As he was responding to the call, he saw a car containing two people leaving the area near Tuvox and took down the license plate number as 3KJT456. He later learned the car was registered to defendant Riley. He identified Riley at trial as the driver.

Defendants were arrested about four months later at 4:30 a.m. on October 8, 2003. Sunnyvale Public Safety Officer Hyun Choi was conducting security checks near Almanor and Palomar Avenues because of a recent rash of commercial burglaries in the area. From a vantage point inside his patrol vehicle which was parked behind a row of junipers, Choi saw a white Geo Prizm back into the farthest parking stall in Nuvelo Company's parking lot at 675 Almanor. The driver, later identified as David Brown, turned off the lights and engine, and a passenger, later identified as defendant Yarbrough, got out of the back seat of the car and started walking toward Almanor. Choi approached the Prizm in his patrol vehicle, at which point Yarbrough returned to the Prizm.

Choi found Brown sitting in the driver's seat, defendant Riley in the front passenger seat, and Yarbrough sitting in the rear passenger seat. Choi saw a hammer, ski mask, and a pair of dark gloves on the seat beside Yarbrough. He told Brown to turn off the engine and called for backup.

After other officers arrived and the three men were removed from the Prizm, Choi noticed that the hammer had been moved to the rear floorboard on top of some plastic bags and the gloves, formerly in plain view, had been moved underneath the plastic bags. The hammer and gloves had glass shards on them. Officers found an additional ski mask and gloves in the front passenger area and the driver's side of the car, and, in the trunk, another hammer and more gloves. Yarbrough's shoes were dirty and muddy. Yarbrough said he did not know how the mud got there. The presence of mud was significant to Choi because several past burglary sites had dirt and vegetation beneath the windows. Brown's jacket, which was booked into evidence, also had glass shards on it.

At the Artest Company (count 6), the business directly across from where the Prizm had been parked and toward which Yarbrough was walking, Choi later saw a laptop computer sitting on a desk near the window. No windows were broken.

The men were separated and briefly interviewed at the scene. Yarbrough said that he had come from Sacramento and that the group was going to Riley's girlfriend's house

in San Jose. Riley said that Brown was driving him to Riley's girlfriend's house in San Jose and that they had come from Sacramento. Riley said he used to work at a business called SSI on Almanor, so he was familiar with the area.

Brown told an officer at the scene that he had driven from Sacramento and that he had gotten a call from Riley and Yarbrough, whose car had broken down, and that he was giving them a ride. He said he was tired and pulled off to rest because he was familiar with the area from having worked nearby. At trial, after pleading guilty to conspiracy to commit burglary,[2] he testified that he had driven from Sacramento, picked up Riley, decided to visit Yarbrough, picked him up and drove back to Riley's house where they talked and drank beer for four hours. They then decided to drop Riley at his girlfriend's house in San Jose; Yarbrough came along because Brown was not familiar with the area and needed directions for his return. Brown noticed that he was not driving straight, so he pulled off highway 101 to rest for five or 10 minutes. He did not go to the Denny's restaurant because he had no money and it was easier to make a right turn than to cross all lanes of traffic into Denny's. He pulled into a parking lot of what looked like an abandoned building. Before he turned off the engine, a light was shining on him and he saw the police car.

Brown stated that he worked at a window supply company loading and installing large glass windows and doors. He often took windows to the dump, and he broke up the glass so people would not steal the windows. He used a hammer and a mask and kept

[2] When Brown pled no contest to conspiracy to commit burglary in March 2004, he was promised the burglary charges would be dismissed and he would be immediately released from custody. He was placed on probation and served the balance of six months in the county jail. On August 5, 2005, Brown pled guilty to commercial burglary and resisting arrest in a subsequent case based on an April 2005 incident when he smashed the window of a restaurant, removed a large-screen television set and loaded it into his van and drove away. When Brown testified, he was awaiting judgment and sentencing in that matter.

extras in the car for coworkers. He admitted he lied when he told police that he had the mask in the car as part of a Halloween costume.

Sunnyvale Detective Terry Schillinger found on Riley's person a business card for Action Computers, a company that bought and sold computers. Jonathan Putnam of Action Computers testified that Riley had been a customer of his for years, and that although he did not recall specific transactions, he had records showing that Riley sold a Dell computer on September 9, 2002, and a Dell monitor on November 25, 2002. Yarbrough sold a Dell computer and flat panel display on December 3, 2002, and a Dell computer on January 2, 2003, but nothing thereafter.

The other burglaries, of Anda Networks (count 1), two laptop computers taken on July 23, 2003; Sunext Design (count 7), one laptop computer, at the end of July 2003; and Cloudshield Technologies (count 2), two laptop computers, total loss of $6,010, on August 17, 2003, were tied to defendants by evidence recovered at the scenes of the crimes.

Sunnyvale crime scene investigator Ted Zitnay recovered pieces of broken glass that retained muddy shoeprints from the burglary sites. He also produced photographs of shoeprints found outside the various buildings.

Santa Clara County criminologist John Bourke compared the soles of Yarbrough's shoes with shoeprint impressions made either in the soil outside the burglary sites or on pieces of broken glass from the smashed windows. He determined there was a match for Yarbrough's left and right shoes with the impressions recovered from Anda Networks and that Riley's shoes could have left some impressions; there was an association of one of Yarbrough's shoes with an impression from Cloudshield. There was an identification of Yarbrough's shoe from an impression at Sunext Design and Riley's shoe could have left an impression there. Mark Moriyama, a glass expert, found that glass fragments on Riley's shoes shared characteristics with glass from Tuvox.

The trial court admitted other crimes evidence consisting of a list of 12 similar cases Detective Schillinger had developed as part of the investigation. These cases all occurred in the north Sunnyvale area, involved window smashes and the taking of laptop computers, and occurred around the time of the charged burglaries. Five of the six charged burglaries, but not the Tuvox burglary, were part of the list. The import of this evidence was that commercial burglaries where the perpetrators had broken a window and reached inside for a laptop came to "either a screeching halt or went down to nearly zero" after defendants were arrested.

In addition, Linda Gentry, Sunnyvale crime analyst, analyzed reports of smash-and-grab burglaries of the area which occurred at commercial establishments late at night in which high-tech items were stolen in northern Sunnyvale. She testified to the frequency of such crimes as classified by month and year. From January 2003 to November 2003, there were from two to eight such crimes a month. From December 2003 to June 2005, four such crimes were committed, one each in February, June, and July 2004 and April 2005. The remaining 15 months had zero smash-and-grab burglaries.[3] Defendants were arrested in October 2003.

The defense presented investigator Bruce Rak, who testified he drove past Artest Company on Palomar at night at the posted speed limit of 25 miles per hour and could not see inside the lighted windows from the street. He also would not have been able to

[3] The month and number of crimes were as follows:

2003	**2003, cont'd.**	**2004**	**2004, cont'd.**	**2005**
Jan.: 2	Jul.: 3	Jan.: 0	Jul.: 1	Jan.: 0
Feb.: 3	Aug.: 8	Feb.: 1	Aug.: 0	Feb.: 0
Mar.: 4	Sept.: 2	Mar.: 0	Sept.: 0	Mar.: 0
Apr.: 6	Oct.: 2	Apr.: 0	Oct.: 0	Apr.: 1
May: 6	Nov.: 2	May: 0	Nov.: 0	May: 0
Jun.: 2	Dec.: 0	Jun.: 1	Dec.: 0	Jun.: 0

see someone getting out of a car in the Prizm's position when parked in the location of Choi's patrol vehicle. In rebuttal, Choi testified that the lighting at Artest had changed by the time Pak drove by.

Yarbrough's mother testified that she accompanied her son in early October 2003, to a flea market where he bought a pair of used boots that resembled those admitted into evidence.

Celia Hartnett, lab director at Forensic Analytical, an independent crime lab, reviewed a report prepared by her lab which compared an inked impression of Yarbrough's shoe soles and impressions made from glass shards collected at the crime scenes. Forensic Analytical's initial report agreed with the Santa Clara County crime lab's conclusion that Yarbrough's shoe left an impression on a piece of glass from Sunext. However, Hartnett reviewed the report and the notes from Santa Clara's crime lab, then redid the analysis and concluded Forensic Analytical's initial report was incorrect. Hartnett had her report reviewed by another supervising criminalist at her company. He agreed with her that the comparison was inconclusive, although Yarbrough's shoe could not be completely excluded as having made the impression.

John Bourke of the Santa Clara County crime lab was recalled by the prosecution to testify to credentials he had that he believed were superior to Hartnett's, the superiority of the county crime lab over Forensic Analytical, and personal proficiency tests he took that Hartnett did not. He remained convinced that his opinion was correct.

Defendants were each convicted of three counts of second degree burglary, one count of attempted second degree burglary, and conspiracy to commit burglary. Both defendants were convicted in count 1 of second degree burglary of Anda Networks and in count 6 of the attempted second degree burglary of Artest, and in count 3 of conspiracy to commit burglary of Artest. (At the close of the prosecutor's case, the court had allowed the prosecutor to amend count 6 to conform to proof. That count originally alleged the attempted burglary of Nuvelo Company in whose parking lot defendants were arrested.)

Yarbrough was convicted in counts 2 and 7 of the second degree burglaries of Cloudshield Technologies and Sunext Design and he was acquitted on the second degree burglary of Epicor charged in count 8. Riley was convicted in counts 4 and 5 of the second degree burglaries of Tuvox Company and Cellgate Company. As stated above, both defendants were sentenced to four years in state prison. Yarbrough was also ordered to pay $12,500 in attorney fees. This appeal ensued.

ISSUES ON APPEAL

Riley complains that the court erred in permitting the prosecution to amend count 6 of the information to charge an offense against a new victim after entry of a judgment of acquittal on a charge that arose out of the same course of conduct. Next, Yarbrough, joined by Riley, asserts the evidence was insufficient to support a guilty verdict on count 6, and also that the court erred in admitting evidence of uncharged burglaries. Yarbrough separately claims that this court should strike the order that he pay attorney fees because the trial court made no finding of ability to pay.

AMENDMENT OF THE INFORMATION

Riley asserts that after the prosecution rested, the defense moved for an acquittal of count 6, the attempted burglary of Nuvelo Company on October 8, 2003. (§ 1118.1.) The trial court invited the prosecution to amend the information to conform to proof to charge the attempted burglary of Artest Company. The prosecutor so moved before a ruling was made on the section 1118.1 motion. Thereafter, the court granted the prosecution's motion to amend, and although defense counsel objected, the trial court concluded, "with that amendment, I believe the evidence is sufficient to defeat [the section] 1118.1 motion at this point." Riley did not request a continuance.

Now Riley states the amendment was barred under section 654's preclusion of multiple prosecutions as interpreted by *Kellett v. Superior Court* (1966) 63 Cal.2d 822. As Riley reads the record, "[i]n effect, the court granted the motion for acquittal as to the attempted burglary of Nuvelo, but then permitted the prosecution to bring a new charge--

the attempted burglary of Artest--by amending the information." According to Riley, *Kellett* holds that " '[w]hen . . . the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.' (*Kellett*, *supra*, 66 Cal.2d at p. 827.)"

The record shows that the operative fact on which Riley basis his argument, that the trial court granted his section 1118.1 motion before it granted the prosecution's motion to amend the complaint, is factually untrue. Consequently, as long as the defendant's substantial rights are not compromised, amendment of an information at trial to state an offense established at trial is proper. (*People v. Jones* (1985) 164 Cal.App.3d 1173, 1178.) As in *Jones*, "[a]ppellant had notice from the evidence . . . that the additional charges might be included in the information. The amendment required no additional evidence or preparation by defense counsel to meet the new charges; it merely conformed the pleading to proof. No request for continuance was ever made. Under these circumstances, we find no abuse of discretion in the trial court's order granting the prosecution permission to amend the information." (*Id*. at p. 1179.) In our case, as in *Jones*, there was no abuse of discretion.

ADMISSION OF EVIDENCE OF UNCHARGED ACTS

Yarbrough, joined by Riley, complains that pursuant to Evidence Code section 1101, subdivision (b), and the "doctrine of chances" theory, the prosecutor moved in limine to introduce evidence of 13 other uncharged burglaries in Sunnyvale to prove identity, knowledge, and intent. Yarbrough objected, claiming "absolutely zero evidence of any physical, or observational" kind to Yarbrough and that the prosecutor's purpose was to "create . . . an aura of prejudice against Mr. Yarbrough and Riley." Citing *People*

v. Erving (1998) 63 Cal.App.4th 652 (*Erving*), the trial court found the proposed evidence to be relevant under both these theories.

Defendants object to admission of investigator Schillinger's statement that after investigating a series of broken-window thefts in the north Sunnyvale area, he concluded that 12 burglaries were committed by the same people and his and investigator Zitnay's descriptions of the evidence related to the charged burglaries, as well as evidence obtained from uncharged burglaries at Blue Coat Systems, Accurel, Tru Si Tech, and businesses at 904 West Weddell Court, 975 Benecia, 262 Santa Ana, 1240 Elko, and 250 North Wolfe Road. Defendants also object to senior crime analyst Laura Gentry's statistical evidence demonstrating that after October 8, 2003, the incidence of smash-and-grab burglaries in north Sunnyvale decreased dramatically.

Evidence Code section 1101, subdivision (b), allows evidence of uncharged misconduct when it is relevant to establish a material fact other than the person's bad character or criminal disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) In *Ewoldt*, the California Supreme Court held that the least degree of similarity between the uncharged act and the charged offense is required in order to prove intent. However, an uncharged act "must be sufficiently similar to [the charged offense] to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." ' " (*Id*. at p. 402.) To prove identity, however, "[t]he greatest degree of similarity is required." (*Id*. at p. 403.) The uncharged misconduct and the charged offense must share common features that are sufficiently distinctive, in fact so distinctive as to be like a signature, so as to support the inference that the same person committed both acts. (*Ibid*.) On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1147-1149.)

The uncharged burglaries were relevant here to show intent and identity when taken in connection with evidence from the charged burglaries. Evidence of the charged

burglaries showed that on one occasion, defendants' car was seen leaving the area of a smash-and-grab burglary. On another, defendants were apprehended at 4:00 a.m. in the area of numerous smash-and-grab burglaries, in a parked car in a business park parking lot surrounded by offices of numerous firms of a type which had recently been the victims of smash-and-grab burglaries. Nearby were broken windows through which laptop computers had been stolen from desks next to those windows. When defendants were arrested, glass fragments were found on a hammer, ski masks, gloves, and Brown's jacket in the car. Footprints taken from the scenes of some of the charged burglaries tied defendants to the crimes.

The 13 uncharged burglaries that were not directly linked to defendants through other evidence were relevant to defendant's identities as perpetrators to the extent that they were substantially similar to the charged burglaries to constitute a "signature." This was established by the description of the burglary scenes and the statistical evidence which was part of the "signature pattern" to show identity under the teaching of *Erving*, *supra*, 63 Cal.App.4th 652. In *Erving*, the court admitted evidence of 40 uncharged fires that occurred in neighborhoods where defendant had lived to prove identity. Each fire was set in a neighborhood where defendant lived, either at her home or within easy walking distance of it. Few, if any, arson fires occurred in those neighborhoods before defendant lived in them, and they stopped when she moved. In addition, all the fires were started using an open flame device, without accelerants, during the early morning hours, in areas accessible from the street or to which defendant had access, using fuel materials that were already present at the scene. (*Id.* at pp. 660-661, & fn. 4.)

In our case, the trial court noted that in *Erving*, the "signature" was "proximity to the [appellant]." (*Erving*, *supra*, 63 Cal.App.4th at p. 660.) Furthermore, "we have something in addition to proximity to the three defendants. All of [them] come from out of town to . . . find themselves at 4:00 o'clock in the morning loitering outside a particular burglary site. It's right in the middle of an area where 13 similar uncharged

burglaries and the six charged burglaries have occurred. . . . [W]hat is relevant is that all these cases have a unique common signature and method of operation . . . . So under that theory and under the theory of *Erving*, it's certainly relevant."

We agree with the trial court. It did not abuse its discretion in admitting the evidence of the uncharged burglaries.

SUFFICIENCY OF THE EVIDENCE OF COUNT 6

Next, defendants argue that there was insufficient evidence that they intended to burglarize Artest and would have done so but for the intercession of Officer Choi. They state, "there was absolutely no evidence to support an inference that [defendants] w[ere] aware of the laptop computer inside the office at Artest *or* that [Yarbrough] specifically intended to burglarize that office building. Even assuming *arguendo* the men pulled into the parking lot across from [Artest] to 'case' the surrounding office buildings in search of potential burglary targets, this is a far cry from proof that [defendants] 'clearly indicate[d] a certain, unambiguous intent to commit [the] specific crime' of breaking into Artest to steal the laptop computer. . . . Nor was [Yarbrough]'s act of leaving the car and walking towards Almanor before turning back [when he saw Choi's patrol vehicle] 'an immediate step in the present execution of the criminal design' to burglarize Artest."

In assessing a sufficiency-of-the-evidence argument, the test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The court must view the evidence in light of the whole record, drawing all inferences in favor of the judgment and must presume the existence of every fact in support of the judgment that could reasonably be deduced from the evidence. To uphold conviction, the record must contain evidence that is reasonable, credible, and of solid value such that any rational trier of fact could have been persuaded of the defendant's guilt. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382; *In re Jose P.* (2003) 106 Cal.App.4th 458, 465; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

The jury was instructed: "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

"In determining whether this act was done, it is necessary to distinguish between mere preparation, on one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design." (CALJIC No. 6.00.)

"A person, who has once committed acts which constitute an attempt to commit a burglary, is liable for the crime of attempted burglary even though he does not proceed further with the intent to commit the crime, either by reason of voluntarily abandoning his purpose or because he was prevented or interfered with in completing the crime." (CALJIC No. 6.01.)

Using these principles, the jury found defendants guilty of attempted burglary. On review, we find the evidence is sufficient to support the conviction. Riley, Yarbrough, and Brown drove into a private parking lot, parked in front of the Nuvelo Company and Yarbrough walked toward Artest, the business across the street. The sight of Officer Choi's police unit, made him decide to return to the car. Defendants' car contained burglar tools, including a glass-encrusted hammer, gloves, masks, and a jacket which had glass on it. Riley had on his person a business card from a computer company where he and Yarbrough had sold computers and components in the past. Artest was in an area where there had been "a rash" of commercial "smash-and-grab" burglaries of businesses

where computers were taken. As Choi later determined, there was a laptop visible through an office window from outside Artest. Evidence of the other burglary counts and the conspiracy count as well as the testimony on the statistical evidence of similar smash-and-grab burglaries in the Sunnyvale area in the recent past constituted overwhelming evidence of defendants' intent.

Although defendants make much of the fact that the defense investigator testified that he could not see inside the Artest offices as he drove by at 25 miles per hour, the evidence merely contradicts other evidence in the case. Choi testified that the lighting in the area had changed by the time the investigator drove by. Also, it was not established that defendants drove by as quickly as their investigator did. Nevertheless, resolution of disputed evidence is a matter for the trier of fact. The jury convicted defendants. Choi's testimony reasonably could support the inference that defendants knew or strongly suspected that there were one or more laptops readily accessible by breaking Artest's windows.

More importantly, it was not necessary that Yarbrough be actually aware of a computer inside a specific office toward which he was walking. The key factor here is the clarity of his intent. If an observer can reasonably conclude "that a crime will be committed" absent intervention from an observation of a suspect's acts, "the attempt is underway, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him." (*People v. Dillon* (1983) 34 Cal.3d 441, 455.) *Dillon* states that convictions of attempt have been upheld even though the defendant did not actually go onto the premises where the crime was to be committed. (See, e.g., *United States v. Stallworth* (2d Cir. 1976) 543 F.2d 1038 [attempted robbery]; *People v. Vizcarra* (1980) 110 Cal.App.3d 858 [same]; *People v. Gibson* (1949) 94 Cal.App.2d 468 [attempted burglary].) (*People v. Dillon, supra,* 34 Cal.3d at p. 456, fn. 4.)

The evidence was sufficient to support the conviction of count 6.

ATTORNEY FEES

Yarbrough claims that the trial court erred in ordering him to pay attorney fees when it did not make a finding that he had the ability to pay as required by section 987.8. His attorney objected, but the court did not modify or strike the order. Yarbrough states that in section 987.8, subdivision (g)(2)(B), the statute states that "[u]nless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." Defendant asks this court to strike the order or remand for a hearing on the issue of ability to pay.

The People concede the issue and request remand. We shall so order.

DISPOSITION

The attorney fee order is vacated and the matter remanded to the trial court for proceedings in accordance with this opinion. In all other respects, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.